agreement when they entered it and therefore section 66 of the Contracts Act cannot assist them.

Appellants' counsel further contended that respondents had acquiesced in the agreement. We think that this is too crude an argument. It overlooks the fact that the respondents were not aware of the express condition until they were warned by the Government Industrial Development Department of the breach. If a man acquiesces to something of which he knows nothing, it is of no real evidential value. "Acquiescence must be founded on a full knowledge of the facts, and further it must be in relation to a transaction which may be valid in itself and not illegal and to which effect may be given as against the party by his acquiescence in and adoption of the transaction." (See *La Banque Jacques-Cartier* v. *La Banque Depargne De La Cite Et Du District De Montreal*[12]).

It is unnecessary in the circumstances for us to deal with the respondents' case based on fraudulent misrepresentation and so we say nothing about that.

For these reasons, we are of the opinion that both the appeals ought to be dismissed with costs. The reasons which we have given do not differ in substance from the ground that commended itself to the learned Judicial Commissioner.

Appeals dismissed.

Solicitors: *Ong Ban Chai & Razak; Gunaretnam & Co.*

OOI SOON ENG v. NG KEE LIN

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Syed Othman F.JJ.) December 5, 1978 & April 21, 1979]

[Penang — Federal Court Civil Appeal No. 89 of 1978]

Practice and Procedure — Consent order — Application to vary consent order — Partnership accounts — Appeal Record — Cross-appeal relating to costs only — R.S.C. 1957, O. 28 r. 11 & O. 37 r. 1G — Courts of Judicature Act, 1964, s. 68(1).

The respondent in this case had taken an action for the partnership between him and the appellant to be dissolved and for various accounts and enquiries. An order for the taking of accounts was made by the learned trial judge. The appellant applied for variation of the order and the appellant was allowed to make an application for that purpose. At the hearing of this application the learned judge made an order that the appellant do furnish accounts of the Eng Thye Company which belonged to the partnership. The appellant appealed and argued that the accounts should be only from January 1, 1974. The appeal record contained a number of documents and material not relevant to the appeal. The respondent lodged a cross-appeal against the order that each party should bear its own costs.

Held: (1) in view of the fact that the accounts of the Eng Thye Company for the period January 1, 1962 to December 31 1973 had been settled, the proper order should have been production and inspection of the accounts from January 1, 1974;

(2) in view of the irrelevant matter included in the appeal record, the cost of preparing the record should be trimmed by a half;

(3) as no leave had been obtained for cross-appeal from the order relating to costs, the cross-appeal should be dismissed.

Cases referred to:-

(1) *Nam Thian Siew* v. *Chuah Wai Lam* [1959] M.L.J. 126.
(2) *Amar Singh* v. *Chin Kiew* [1960] M.L.J. 77.
(3) *Lyus* v. *Stepney Borough Council* [1941] 1 K.B. 134.
(4) *Huddersfield Banking Co.* v. *Hg. Lister and Sons* [1895] 2 Ch. 273.
(5) *Wilding* v. *Sanderson* [1897] 2 Ch. 534.
(6) *Kelsey* v. *Doune* [1912] 1 K.B. 483.
(7) *Dawson* v. *Hill* [1934] W.N. 219.
(8) *Mullins* v. *Howell* (1879) 11 Ch. D. 763.
(9) *B (GC)* v. *B (BA)* [1970] 1 All E.R. 913, 916.
(10) *Lim Siew Neo (f)* v. *Pang Keah Swee* [1958] M.L.J. 111.

FEDERAL COURT.

T.R. Hepworth (*K. Balasundaram* with him) for the appellant.

Tan Phock Kin for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The two protagonists in this action were the partners of a business trading under the firm name of Eng Thye Company in unequal shares. They had come to the parting of the ways. The respondent who was the minor partner took an action against the appellant for a declaration that the partnership had been dissolved on a certain date, and at the same time prayed for various injunctions, accounts, the necessary enquiries and for the appointment of a receiver and manager and for ancillary reliefs. There was nothing so far from the statement of claim to indicate that the action was different from the ordinary one in relation to a partnership, following upon the action of one of the partners to seek a dissolution, but as soon as action was commenced the respondent took a series of interlocutory actions that grossly increased the work-load in the action. This is, of course, within the entire competence of the respondent, but in compiling the appeal record, almost every process that had been taken, almost every paper that had been filed and every argument put forward had been included, in chronological order and against all rules for compiling the record, without the slightest attention or consideration being given whether what had been included is or is not relevant to the issue at the appeal. It all makes for an increased difficulty in reading the record and understanding what it is all about.

We have to separate the wheat of the appeal from the chaff and in doing so we find it regretfully necessary to trace in this judgment the course of the proceedings that brought this appeal up, ignoring entirely the other processes.

On September 21, 1976, the respondent as plaintiff took out a summons-in-chambers (pages 39-41 Record) for an account in respect of Eng Thye Company, an enquiry and payment. This summons-in-chambers was heard but no order was drawn up and it would appear that by a proceeding not disclosed, the order in terms that was made was subsequently set aside. We do not know why. However, on March 15, 1977, the respondent took out another summons (pages 205-206 Record), this time for directions, requiring (keeping

the same notations for ease of understanding the judgment of the learned trial judge) the production of

(A) The account books, vouchers, bank statements and other relevant documents of the partnership firm of

(1) Eng Thye Company for the period 1.1.1962 to 15.6.1976,

(2) Thye Seng for the period 1.1.1962 to 31.12.1963,

(3) Eng Huat for the period 1.1.1962 to 31.12.1972,

(4) Thye Huat for the period 1.1.1968 to 15.5.1976,

(5) Sanglang Rice Mill for the period 1.1.1972 to 31.12.1973;

and

(B) the profit and loss accounts and Balance Sheets of these partnership firms for the same periods.

On April 9, 1977, the parties appeared before the judge in chambers. For consideration by the judge were, as stated in his notes, Enclosures 8 and 29 in the court file. What these enclosures were we have not been told and we are left to assume that they refer to the summons-in-chambers for accounts, etc. and to the summons for directions respectively.

At this hearing, after arguments, the learned judge made in the summons-in-chambers for accounts an order in terms save that the order was not for accounts on the basis of wilful default and in the summons for directions an order in terms except that no order was made in respect of Sanglang Rice Mill. Thus in an action for accounts in the partnership business of Eng Thye Company, an order has been made concerning the accounts of other businesses, viz. Thye Seng, Eng Huat and Thye Huat, on the contention that the appellant was at the relevant times a partner in these businesses. So far, the respondent had everything his way.

As noted, the order in the summons-in-chambers was never drawn up and it was subsequently set aside. The order in the summons for directions was expressed to have been made by consent and it was drawn up and perfected. The perfection of the order must mean that the respondent's counsel had seen and approved the draft order. Nevertheless, an application to vary this order was made and a good deal of argument in the High Court and in this appeal turns on the consent nature of the order and therefore it is perhaps necessary to set out the arguments of counsel as summarised in the judge's notes (pages 210-211 Record).

"Encl. (29) — Summons for Directions section 26(i) Partnership Act 1961. Balasundaram (counsel for the present appellant): concedes to application except for last paragraph (5), Sanglang Rice Mill which does not belong to partnership.

Tan: Statement of Claim, paragraph 3(1)(k) in 1973; disposal or sale. No denial in Statement of defence whatever.

Balasundaram: Concedes no denial in Statement of defence. Submits still open for amendment. Refers to affidavit (30) paragraph 7.

Tan: agrees to pursue question of prayer (5) separately O.I.T. by consent except for prayer A5 and B5, to be made available within two weeks at the office of the Accountant in Penang.

Costs to plaintiff in both applications."

It is to be noted that the references by Mr. Tan for the respondent to his client's statement of claim is not to paragraph 3(1)(k) but to paragraph 8(1)(k). And by way of explanation, the A5 and B5 in the order of the judge refer to Sanglang Rice Mill. Now, on the arguments and on the wording of the order made, if the order was not by consent, at the very least, the then counsel for the appellant had not resisted the application for directions except as to Sanglang Rice Mill.

It is necessary now to turn to the statement of claim to see on what basis the three other partnership businesses of Thye Seng, Eng Huat and Thye Huat had been brought in. All that paragraph 8 charged the appellant with doing was wilful neglect or default and that the accounts hitherto rendered did not reveal a true and correct position of the partnership's trading in that, *inter alia*, the appellant had failed to account for the profits of these businesses for the years stated, but nowhere in the statement of claim has it been averred that the appellant was a partner in these businesses in his capacity as a partner of Eng Thye, to justify the inclusion of these businesses in the action between the partners of Eng Thye.

Within the time specified in Order 54 rule 22A Rules of the Supreme Court, 1957 and in accordance with the provisions thereof, the appellant by his solicitors applied for further arguments in open court. The letter at page 215 of the Record reads as follows:

"11th April, 1977.

The Senior Assistant Registrar,
High Court,
Alor Star, Kedah.

Dear Sir,

Re: Alor Star High Court
Civil Suit No. 249/76
Ng Kee Lin (Plaintiff)
— vs —
Ooi Soon Eng (Defendant)

The defendant being dissatisfied with the Order made by his Lordship the judge on the 9th day of April 1977 in respect of the Summons-in-Chambers dated 9th November 1976 hereby makes application in accordance with Order 54 rule 22A for further argument in Open Court.

Yours faithfully,
(Sgd:) Balasundaram & Co.

c.c.
M/s: Thillaimuthu & Phock Kin,
Advocates & Solicitors,
Penang."

This letter refers specifically to the summons-in-chambers dated November 9, 1976 said to be heard on April 9, 1977. But there is, in the voluminous Record which we believe contains each and every single document filed in court so far as human industry could provide, *no* such summons. There is a summons-in-chambers of September 21, 1976 which is, we believe, Enclosure 8 and is for the accounts of Eng Thye. There is also a summons for directions dated March 15, 1977 for the accounts not only of Eng Thye but of other businesses as well, which we believe is Enclosure 29. Both these summonses were argued on April 9, and they were the only ones argued that day as the judge's notes made clear. So what did the solicitors want to argue further in open court? Was it Enclosure 8 or was it Enclosure 29? It could not be both. The requirement for further arguments was

only in respect of one. It must be either Enclosure 8 or Enclosure 29 since they were the only two heard that day. We trust it is not too much to expect that solicitors would be careful in their references and give every assistance in the court's task of adjudication. But it would appear the reference was to the summons-in-chambers and not to the summons for directions.

The further arguments in open court were presented on September 28, 1977: see the judge's notes at pages 272-282. The arguments took the whole day and included other applications. Though counsel for the appellant (who did not appear on April 9, 1977) opened on the summons-in-chambers for the accounts of Eng Thye, he went on to argue on the summons for directions, despite the fact that no application for further arguments had been made in respect of it. At the end of counsel's arguments and without apparently requiring any reply from counsel for the respondent (the notes do not disclose any representation from this side), the judge ruled

"I allow defendant to file application to vary or correct the consent order (encl. 35) within three weeks on or before October 18, 1977. This application is adjourned to a date to be fixed and argued together with the pending application."

We pause here to make two observations. What that pending application, which is different from the application to vary or correct, is, we have no means of discovering. But perhaps it is not necessary for our purpose. Then the order that was drawn up made reference to a notice of motion, which was given an enclosure number. We have not been shown this notice paper, if there was one, but an application for further hearing in open court is ordinarily made by letter which cannot be described as a notice of motion and there is no necessity for any notice of motion.

The notice of motion for variation or correction of the consent order pursuant to the leave of the judge sought substantially to remove from it all references to the three separate businesses of Thye Seng, Eng Huat and Thye Huat and to limit the production of accounts, etc. of Eng Thye as from January 1, 1974 on the contention that all accounts up to December 31, 1973, have been settled accounts. The wording of the order as varied sought by the appellant (see pages 291-2) reads as follows:

"... It is ordered that the defendant, his servant and agents do on reasonable notice produce to the plaintiff and permit him to inspect and peruse and to take copies and abstracts thereof and extract therefrom as he may be advised of the documents mentioned below at the office of the Partnership or at such further or other place as may be mutually agreed between the plaintiff and the defendant. And it is further ordered that the defendant do pay to the plaintiff the costs of this application to be taxed under the Higher Scale to the second schedule of the Rules of the Supreme Court 1957 and it is lastly ordered that there be liberty to apply.

The documents referred to above are:—

Such of the books of account of the Partnership as contain entries after the 31st day of December 1973 in respect of receipts and payments specifically mentioned in the pleadings."

This notice of motion for variation was heard on March 25, 1978 and adjourned to May 20 for judgment. On that day, the judge read a written judgment in which he allowed the deletion of all references in the consent order made in the summons for directions to the three other businesses of which the appellant was but the respondent was not, a partner, but he refused to allow any variation or correction by restricting the production of Eng Thye's accounts to the period commencing January 1, 1974.

In other words, the judge refused to disallow the accounts from the inception of the partnership to December 31, 1973 on the footing of settled accounts. The appellant succeeded in everything except this and it is from this part of the order that he now appeals.

Apropos, therefore, of what we have said earlier on with regard to the preparation of the record of appeal, we have difficulty in discerning any purpose in including in the record matters extraneous to the subject-matter of the appeal, matters such as the application to seize and deliver partnership property, the appointment of a receiver and manager, application to set aside pleadings and the consequential application to amend or deliver fresh pleadings, particularly as the reliance put at the hearing of the appeal on some of them to indicate the state of mind of the appellant appears of doubtful value. We also note, it must be said, with disapproval, the duplication of exhibits and affidavits and the inclusion of correspondence which have absolutely no reference to the subject for determination. Every piece of paper appears as grist to the legal mill in churning out the record of appeal and the height of absurdity was surely reached at the appeal when a supplementary record was tendered, disclosing a document of service of the order of court made on April 9, 1977 on the appellant. No thought was given to the costs of such useless or irrelevant material but obviously they must be borne by the party responsible, and will not necessarily follow the event.

This court has in *Nam Thiam Siew* v. *Chuah Wai Lam*[1] and in *Amar Singh* v. *Chin Kiew*[2] condemned the practice of including in the record of appeal unnecessary matters and has in the past not hesitated in a proper case to make deductions from the costs of the action, making the party responsible to pay for such deductions. See also *Lyus* v. *Stepney Borough Council*[3] at page 153. But we suppose it would be too much to expect every member of the Bar to listen and to heed and that some would continue in their wasteful ways.

The notice of appeal lodged by the appellant was restricted to "such part only of the said decision as decides that the order of court dated the 9th day of April 1977 shall not be varied in respect of the production, inspection and taking of copies and extracts therefrom of the books of accounts, profit and loss accounts, balance sheets and other documents referred to therein relating to the partnership firm of Eng Thye Company." The exact scope of the appeal is not too clear. But the argument of counsel for the appellant at the appeal clarifies what he is appealing from. He had succeeded in eliminating the three separate businesses. Against this part of the order he does not naturally argue. He is prepared to accept an order with respect to Eng Thye for the period January 1, 1974 to the date of dissolution. What he is not prepared to agree to and accept is in respect of the period preceding this.

Now what is the attitude of the respondent? He has lodged a cross-appeal but it is not from the order disallowing the accounts, etc. of the three disassociated businesses. It is only from that part of the order which directs that each party should bear its own costs not only in the matter of the variation of the order but also in the matter of his application for a writ of attachment. Insofar as the appellant's appeal is concerned, he naturally seeks to uphold the judgment and order of the High Court but the absence of any appeal on his part from the substantive order for a variation must mean that the respondent no longer contends that the judge has no powers to amend or vary a consent order that has been drawn up and perfected, in all the circumstances of the case, where there is an error on the part of the applicant only. But somewhat inconsistently, he so contends at the hearing of the appeal.

But, of course, an appeal is by way of rehearing and it is still for this court to say whether a trial court may amend a perfected consent order and whether in the circumstances of the case it is correct to do so.

Under Order 28 rule 11 Rules of the Supreme Court, the general rule is that consent orders may be set aside wholly or in part in a fresh action upon such grounds as would enable the court to set aside or rectify an agreement, as for instance, fraud or mutual mistake: *Huddersfield Banking Co.* v. *Hg. Lister & Sons*[4] and *Wilding* v. *Sanderson.*[5] Interlocutory orders stand in the same position as final orders and cannot be altered save by means of an appeal: *Kelsey* v. *Doune;*[6] *Dawson* v. *Hill.*[7] Under Order 37 rule 1G, the court may, on sufficient cause being shown revoke or vary by a subsequent order an order made or given at or before the trial, in the circumstances set out in rules 1A to 1F of this Order, but they do not apply to this case.

This case is one of mistake on the part of one of the parties and the case relied on by the appellant is *Mullins* v. *Howell,*[8] in which Sir George Jessel M.R. held:

"I have no doubt that the court has jurisdiction to discharge an order made on motion by consent when it is proved to have been made under a mistake, though that mistake was on one side only, the court having a sort of general control over orders made on interlocutory application."

In 1970, Ormrod J. (as he then was) approved and adopted the above dictum of Sir George Jessel M.R. quoted above: *B(GC)* v. *B(B.A.)*[9] at page 916.

We now come to the nub of the appeal. Should the appellant be ordered to make discovery and give inspection from January 1, 1962 or only from January 1, 1974. On the concession by the respondent that there are settled accounts for the period January 1, 1962 to December 31, 1973 and in the absence of any allegations of fraud in the statement of claim and having regard to the withdrawal on the part of the respondent of any averment of wilful neglect or default by the appellant, it is, in our view, clear that the proper order should have been production and inspection from January 1, 1974.

The appeal is therefore allowed, but in allowing the appeal, we would make it clear, as it must be obvious, that there is nothing we have decided so far to prevent the respondent by suitable amendments from applying at an appropriate stage to re-open the settled accounts on adequate proof of facts that will permit settled accounts to be opened.

As for the costs of the appeal, the appellant shall have them, subject however to the following. We do not think we should embark on a discovery of who was responsible for the appeal record. If it was the solicitors for the respondent who had insisted on including in the record so much of the unnecessary material which counsel for the appellant did not find necessary to refer to in his submission, we would have expected such advice from the Bar that the inclusion was under protest as was given in *Lim Siew Neo (f)* v. *Pang Keah Swee.*[10] In the absence of such advice, the cost of preparing the record of appeal will be trimmed by a half. But the order of the High Court that the costs of the proceedings there should be borne by the parties themselves shall stand. The appellant is not entirely free from responsibility for the events that have happened.

We now turn to the cross-appeal. It should not detain us much longer. It is an appeal from an order of costs. Section 68(1) of the Courts of Judicature Act, 1964 provides

"68(1) No appeal shall be brought to the Federal Court in any of the following cases:

....

(c) where the judgment or order relates to costs only, which by law are left to the discretion of the court, except with the leave of the Federal Court or a judge of the High Court."

No such leave has been obtained. The appeal fails *in limine.* But we would say also that if the matter was before us, we would, having regard to the course of events that had taken place, agree respectfully with the order made. The cross-appeal is dismissed with costs.

Order accordingly.

Solicitors: *Balasundaram & Co.; Thillaimuthu & Phock Kin.*

GOVALAN v. KUALA LUMPUR - KEPONG AMALGAMATED LIMITED

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman F.J., & Abdul Hamid J.) June 2, 1979]

[Kuala Lumpur — Federal Court Civil Appeal No. 59 of 1976]

Industrial Law — Injury to worker in factory — Worker feeding rubber into machine without authority — No negligence or breach of statutory duty — Factories and Machinery (Fencing of Machinery and Safety) Regulations, 1970 reg. 23(9) — Factories and Machinery (Factories and Machinery Person in charge) Regulations, 1970, reg. 9 — Factories and Machinery Act, s. 20.

In this case the appellant was injured when he fed rubber into a machine without authority in the factory where he was working. The learned trial judge found that the appellant's duty at the material times was to clean the floor in the factory, that he had never been asked to operate the machinery and that he had sustained the injury when he